80-366

No. .....

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GREAT LAKES INTERNATIONAL, INC.,
Petitioner,

—against—

SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION; SAMUEL B. NEMIROW, ACTING ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS AND DEPUTY ASSISTANT SECRETARY FOR MARITIME AFFAIRS; ROBERT J. PATTON, JR., SECRETARY OF THE MARITIME ADMINISTRATION; NATIONAL DREDGING, INC.; UNITED STATES CORPORATION COMPANY; JACKMAN & COMPANY; DAVID H. JACKMAN; STUYVESANT DREDGING, INC.; ROYAL BOS KALIS WESTMINSTER GROUP N.V.; WILLIAMS-MCWILLIAMS CO., INC.; UNITED STATES TRUST COMPANY OF NEW YORK and WARBURG PARIBAS BECKER INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STANLEY J. NORTON
Attorney for Petitioner,
Great Lakes International, Inc.
Norton & Christensen
60 Erie Street, P.O. Box 308
Goshen, New York 10924
(914) 294-7949

HENRY N. CHRISTENSEN, JR.
DANIEL J. DONOHUE
MARIE L. MCCANN
Of Counsel

Questions Presented

1. Whether the court below erred in holding that petitioner, an American citizen owning and operating vessels which constitute a part of the United States Merchant Marine, is outside the zone of interests of the Merchant Marine Act of 1936, as amended, and therefore lacks standing under the Administrative Procedure Act to seek injunctive and declaratory relief with respect to the actions of the Maritime Administration, and others, in violation of the Merchant Marine Act of 1936, as amended, and other related statutes, which actions will cause immediate and irreparable injury to petitioner's commercial and maritime interests.

2. Whether the court below erred in looking solely to the legislative history of an amendment to Title XI of the Merchant Marine Act of 1936, as amended, and in determining thereupon the purpose of the statute to be other than that clearly stated in the statutory language.

3. Whether the Merchant Marine Act of 1936, as amended, is part of a statutory scheme having a unified Congressional purpose of protecting the domestic merchant marine from foreign competition, which must be examined in determining the relevant zone of interests for standing purposes.

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GREAT LAKES INTERNATIONAL, INC.,

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SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION; SAMUEL B. NEMIROW, ACTING ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS AND DEPUTY ASSISTANT SECRETARY FOR MARITIME AFFAIRS; ROBERT J. PATTON, JR., SECRETARY OF THE MARITIME ADMINISTRATION; NATIONAL DREDGING, INC.; UNITED STATES CORPORATION COMPANY; JACKMAN & COMPANY; DAVID H. JACKMAN; STUYVESANT DREDGING, INC.; ROYAL BOS KALIS WESTMINSTER GROUP N.V.; WILLIAMS-MCWILLIAMS CO., INC.; UNITED STATES TRUST COMPANY OF NEW YORK and WARBURG PARIBAS BECKER INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Parties to Proceeding Below

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed.

Opinion Below

The order of the court of appeals, affirming the order of the District Court for the Southern District of New York which granted summary judgment dismissing the complaint, is not reported.

Jurisdiction

The order of the court of appeals was dated and entered on June 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The following statutes, which are set forth verbatim in the appendix hereto, are involved in this case:

33 U.S.C. §§ 622, 624 (1976) (Supp. II 1978)
46 U.S.C. § 802
46 U.S.C. § 861
46 U.S.C. § 883
46 U.S.C. § 1101
46 U.S.C. §§ 1271-1280

Statement of the Case

In this action for judicial review of administrative action under the Administrative Procedure Act, petitioner seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, and injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure. The jurisdiction of the district court was invoked under the provisions of 28 U.S.C. § 1331(a). The action arose under the laws of the United States, specifically, Title XI of the Merchant Marine Act of 1936, as amended, and related statues, involves more than $10,000 and is brought against an agency and officers of the United States in their official capacities, among other defendants.

In dismissing and affirming the dismissal of the complaint, the courts below properly assumed the truth of the following allegations of petitioner:

Petitioner, through a wholly owned and other subsidiaries, is engaged in the dredging and marine construction industry throughout the United States and elsewhere. (R.1, Complaint, ¶ 4).* It competes for, and performs, on a regular basis, dredging contracts let by the Department of the Army, United States Corps of Engineers, and others, (*id.*), and in this connection, owns numerous dredges which constitute a part of the domestic Merchant Marine of the United States, and which have been acquired by the investment of millions of dollars over a period of years. (R.1, ¶¶ 37, 50, 59).

Sometime prior to early 1979, respondent, Royal Bos Kalis Westminster Group N.V. ("Bos Kalis"), a Netherlands corporation and the largest dredging firm in the world, (R.1, ¶¶ 15, 43), decided to enter the American market, and in this connection, to construct the largest, most technologically advanced hopper dredge in America, Avondale Shipyards Hull No. 2332 (the "Dredge"),** and to seek financing assistance from the United States government, pursuant to Title XI of the Merchant Marine Act of 1936 (46 U.S.C. §§ 1271 *et seq.*). (R.1, ¶¶ 45-47). As a non-citizen of the United States, however, Bos Kalis is excluded from the domestic merchant marine, of which dredging is a part, since the domestic trade is limited to American built vessels, owned, documented and operated by citizens of the United States, and Title XI financing is available only to aid in the construction of American built

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* All references to "R" are to the record; document numbers are those in the index of docket entries prepared by the Clerk of the United States Court of Appeals for the Second Circuit. In accordance with Supreme Court Rule 19.1, on July 17, 1980, petitioner served and filed a written request to said Clerk to certify and transmit the record to this Court.

** Legal title to the Dredge is to be in respondent United States Trust Company as owner-trustee.

vessels to be owned and operated by citizens of the United States.

In order to circumvent these obstacles, Bos Kalis caused the formation of two Delaware corporations, respondent Stuyvesant Dredging, Inc. ("Stuyvesant"), a wholly owned subsidiary of Bos Kalis, (R.1, ¶¶ 14, 15, 44-47), and respondent National Dredging, Inc. ("National"), (R.1, ¶¶ 10, 44-47). Bos Kalis proposes to enter the United States dredging market, despite the disability of non-citizenship, by means of a series of proposed agreements which are to provide that the Dredge is to be bareboat (demise) chartered to National and time chartered by National to Stuyvesant, (R.1, ¶ 45), both of which were formed solely for the purpose of entering into these charters. (R.1, ¶¶ 10, 15, 44-45). Although a proposed management agreement states that respondent Williams-McWilliams Co., Inc. ("Williams-McWilliams") is to manage the Dredge, (R.1, ¶ 55), an analysis of the various agreements reveals that in fact, exclusive control of the Dredge will lie in Bos Kalis, through Stuyvesant, and that the "time charter" to Stuyvesant is in fact and law a complete demise charter, prohibited by applicable regulations (R.1, ¶¶ 54-59).

National was formed, as noted, at the behest of Bos Kalis, for the sole purpose of bareboat chartering the Dredge from the owner-trustee, (R.1, ¶¶ 10, 45), by respondent United States Corporation Company ("USCC"), (*id.*), a New York corporation admittedly engaged exclusively in the business of furnishing, for lawyers only, services relating to corporations, and not in the business of owning or operating dredges or any other vessels. (R.20, Jackman affidavit, ¶¶ 2-3).

All of National's stock is owned by defendant Jackman & Company, (R.1, ¶ 12; R.20, ¶ 4), a partnership composed entirely of officers and employees of USCC which acts as

a holding company solely at the designation of and pursuant to the directions of USCC. (R.1, ¶ 12). The president of National, respondent David H. Jackman, is a partner in Jackman & Company, and the controlling stockholder of USCC. (R.1, ¶ 12).

Despite the fact that respondent United States Department of Commerce, Maritime Administration ("MarAd") was on notice of the restrictive provisions preventing Jackman & Company from acting except in accordance with the instructions of USCC, (R.1, ¶¶ 25-27), and that USCC in voting National stock through Jackman & Company, was acting for an undisclosed principal who might or might not be a citizen, (R.1, ¶¶ 22-35), nonetheless, MarAd, on November 5, 1979, issued a preliminary conditional letter of approval of the transactions, in which it determined that National was a citizen eligible to be a bareboat charterer and an applicant for Title XI financing assistance, and that it possessed the "ability, experience, financial resources and other qualifications necessary to the adequate operation and maintenance of" the Dredge. (R.1, ¶ 33, Exhibit "4" thereto).

In summary, the formation of National and the agreements among respondents are part of a scheme to violate statutes and MarAd regulations, the sole purpose of which is to enable the private respondents to build, with the assistance of the Government, a dredge to be enrolled and licensed in the United States coastwise trade, in order to allow Bos Kalis to compete, through Stuyvesant, with petitioner and others in the United States dredging industry, from which it is excluded by law.

In the complaint, filed on December 19, 1979, petitioner sought an injunction restraining the Secretary of Commerce and MarAd from finally approving the application of National for Title XI financing assistance, from issu-

ing any guarantee or commitment to guarantee any financial obligations with respect to the construction of the Dredge, and from taking any other steps toward granting the application, and restraining the private respondents from entering into any financial and other contractual agreements and arrangements conditionally approved by the Government in connection with National's application and from taking any other steps toward fulfilling the conditions of the preliminary approval. Petitioner also sought a declaratory judgment that National is not a citizen of the United States within the meaning of the relevant statutes and does not possess the necessary qualifications to operate and maintain the vessel, and as a noncitizen is ineligible as an applicant for Title XI financing or as bareboat (demise) charterer of the Dredge, and holding unlawful and setting aside the conditional approval of National's application by the Government. (R.1, Prayer for Relief at 26-28).

Petitioner's complaint alleged three claims:

(1) MarAd did not have before it sufficient information on which to base its determination of National's citizenship and preliminary approval of the application, since the application contained material misrepresentations and omissions of material fact, and did not contain the proposed charter agreements, as required by applicable MarAd regulations, (46 C.F.R. §§ 298.3(a) and 298.10(a) (1979));

(2) National is not a citizen of the United States and is ineligible to be an applicant for Title XI assistance, (46 U.S.C. §§ 802, 1244(c), 1271(b), 1273(a), 1274(a)(1) and (b)(1)), or to be bareboat (demise) charterer of the Dredge, (46 U.S.C. §§ 802, 808; 46 C.F.R. §§ 221.7(a)(1) and 298.10(a) (1979); 40 Fed. Reg. 28832 (1975)), in that all of the beneficial owner-

ship and voting power of its stock is vested in Bos Kalis, through a chain of fiduciary obligations running from the nominee owner of all the National stock to Bos Kalis, through its counsel; and

(3) The so-called "time charter" to Stuyvesant is in fact and law a complete demise or bareboat charter, which may not lawfully be approved by the government respondents, (46 U.S.C. § 802; 46 C.F.R. § 221.7 (a)(1) (1979)),

each of which prohibited the government respondents from approving the National application. (46 C.F.R. § 298.10(a) (1979)).

Petitioner has alleged that as the direct and immediate result of such illegal agency action approving the charter agreements and the Title XI application, it will be placed in competition in the coastwise trade with the non-citizens Stuyvesant and Bos Kalis, who are excluded by law from the same. *See* 46 U.S.C. §§ 802, 808, 883. After reviewing the petitioner's affidavit and the voluminous affidavits of all respondents, (R.44, Transcript of Hearing, March 12, 1980, at 2), the district court specifically stated its assumption that the constitutional requirement of injury in fact had been established by petitioner's assertion of competitive injury. (*Id.*). However, on March 12, 1980, the district court, from the bench, granted summary judgment dismissing the complaint upon the ground that petitioner lacked standing under the zone of interests criterion, holding that "there is no evidence that Congress, in enacting Title XI, intended to protect anyone from competition or to create any monopolies," (R.44, at 3), and that "[t]he objective of Title XI . . . is simply to build up a strong United States Merchant Fleet and to create employment for American seamen and American shipyards." (R.44, at

4). With respect to the alleged violations of the citizenship requirements in Title XI, the district court held "[t]he citizenship requirements for owners and operators are designed to make sure that the United States would ultimately control the resulting fleet, especially in times of national crisis or war." (*Id.*).

The United States Court of Appeals for the Second Circuit did not disturb the district court's findings regarding injury in fact. On June 16, 1980, it affirmed the dismissal for lack of standing under the zone of interests criterion, but did so on the basis of a holding that the sole purpose of Title XI " 'is to encourage the use of private capital in the financing of ship construction.' " (R.57, Decision at 3).

Argument

1. Consideration of the application of the zone of interests criterion to the alleged violations of the Merchant Marine Acts of 1920, 1936 and 1938, as amended, the sole issue raised herein, necessitates a brief review of those statutes and the regulations thereunder. In §§ 1, 27 and 38 of the Merchant Marine Act of 1920, 46 U.S.C. §§ 861, 883 and 802, respectively, (the "Jones Act"), the coastwise trade of the United States, of which domestic dredging operations are a part, was reserved to citizens of the United States, in order to protect them from foreign competition in that trade. *See Central Vt. Transportation Co.* v. *Durning,* 294 U.S. 33, 36-40 (1935). *See also* 42 O.A.G. 189, 194 (August 7, 1963). With respect to corporations, the citizenship requirements in § 38 of the Jones Act are definite and detailed, in order to prevent the encroachment of foreign interests in the coastwise trade through covert ownership or control of American corporations. *See Douglas* v. *Seacoast Products,* 431 U.S. 265, 274 n. 11 (1975); *Chemical Bank New York Trust Co.* v. *SS. Westhampton,* 358 F.2d

574 (4th Cir. 1965), *cert. denied,* 385 U.S. 921 (1966); *Meacham Corp.* v. *United States,* 207 F.2d 535, 543 (4th Cir. 1953), *cert. dismissed,* 348 U.S. 801 (1954). In § 18 of the Jones Act, Congress forbade the charter to a non-citizen of any vessels of the United States without government approval. 46 U.S.C. § 808, ¶ 3. MarAd's current regulations forbid demise charters, such as that to National, to non-citizens. 46 C.F.R. § 221.7(a)(1) (1979). *See also* 40 Fed. Reg. 28832 (1975). Congress incorporated the citizenship requirements of 46 U.S.C. § 802 into the provisions of the Merchant Marine Act of 1936 in general, (46 U.S.C. § 1244(c)), and into Title XI in particular. *See* 46 U.S.C. §§ 1271(b), 1273(a), 1274(a)(1) and (b)(1). MarAd's Title XI regulations incorporate the citizenship requirements for applicants and demise charterers. 46 C.F.R. § 298.10(a) (1979). The Congressional declarations of policy in the Merchant Marine Acts of 1920 and 1936 express the same goal of fostering an American merchant marine ". . . owned and operated . . . by citizens of the United States." 46 U.S.C. §§ 861, 1101. The 1920 Act did so by excluding non-citizens from domestic employment, in §§ 27 and 38 of the Act, 46 U.S.C. §§ 883 and 802, respectively. *See Central Vt. Transportation Co.* v. *Durning, supra,* 294 U.S. at 38. The 1936 Act did so by extending financial assistance to citizens of the United States. *See* the discussion of the two acts in *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.,* —— U.S. ——, 100 S.Ct. 800, 802-03 (1980). In the last clause of 46 U.S.C. § 861, Congress directed the Secretary to administer all the shipping laws so as to promote that policy as the primary end to be attained.* The enacting clause of the Merchant Marine Act

* Petitioner's interest in remaining free of foreign competition in the coastwise trade is brought within the zone of interests protected by the shipping laws administered by MarAd, including Title XI, by virtue of the Congressional mandate in the last clause

of 1938, Pub. L. No. 75-705, 52 Stat. 953 (1938), of which Title XI is a part, states the purpose of the statute "to further promote" that policy. Petitioner's claims that National is ineligible as applicant and demise charterer of the Dredge and that the charter to Stuyvesant is a demise charter thus alleged violations of the Merchant Marine Acts of 1920, 1936 and 1938 and regulations thereunder, in contravention of the policies of the same.

2. It is undisputed in this action that Stuyvesant is a non-citizen, barred from owning and operating the Dredge, since it is a wholly owned subsidiary of Bos Kalis. With respect to the citizenship of National it is clear that all the stock in National is owned by Jackman & Company, which has no beneficial interest in such shares, and must exercise the voting rights of such stock only in accordance with the directions of USCC. USCC is acting in this transaction in the normal course of its service business, which is limited by law to acting as the agent of a licensed attorney. (New York Jud. Law § 495 (McKinney 1968); *In re Pace,* 170 App.Div. 818 (N.Y. 1915)). Uncontroverted evidence obtained by petitioner in the limited discovery available to it, indicates that USCC's principal is counsel for Bos Kalis. (Appendix 8 to R. 33, Plaintiff's Memorandum In Further Support of its Motion and in Opposition to Defendants' Motions for Summary Judgment). Thus, as a result of that chain of fiduciary obligations, Bos Kalis effectively controls 100% of the voting power in National. The government respondents admitted that they did not

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of 46 U.S.C. § 861, in precisely the same manner as environmental interests affected by otherwise unrelated federal action are protected in 42 U.S.C. § 4332 of the National Environmental Policy Act. *See United States* v. *SCRAP,* 412 U.S. 669, 686 n.13 (1973). Thus, petitioner satisfies the zone of interests criterion, even aside from the fact that the 1936 and 1938 Acts embodied the same protective purpose and policy as the 1920 Act.

consider the fact that National's stock is owned by a fiduciary, and have refused to consider that fact. (R.62, Perry affidavit, ¶ 4). Therefore, if petitioner has standing, its success on the merits is more than probable.

3. The sole issue raised by the dismissal below, the proper application of the "zone of interests" criterion for standing to obtain judicial review under Article 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, is an important one in federal litigation which has not been, and should be, decided by this Court. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), when the "legal interest" test of standing was overruled on the ground that it was in fact a premature judgment on the merits, the majority held that, in addition to the constitutional case or controversy requirements, the question of a plaintiff's standing under 5 U.S.C. § 702 ". . . concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.* Exhaustive research has revealed no case in which this Court has denied a plaintiff standing on the basis of the "zone of interests" criterion. However, a definitive standard for application of that prudential limitation has never been set. On the contrary, this Court expressly declined to decide the meaning, scope and proper application of the criterion in *Sierra Club* v. *Morton*, 405 U.S. 727, 733 n.5 (1972), *United*

* The "zone of interests" criterion was used to find standing under 5 U.S.C. § 702 in *Barlow* v. *Collins*, 397 U.S. 159 (1970), *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971). Although it was applied to uphold standing for a constitutional claim in *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320 n.3 (1977), it has not been applied by this Court in the case of a statutory violation since 1971.

States v. *SCRAP*, 412 U.S. 669, 686 n.13 (1973) and *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976). Moreover, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80-81 (1978) recognized that the prudential limitations on standing need not be independently applied in every case, stating:

> Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.

This Court's most recent statement regarding the current status of "zone of interests" criterion is only that it is ". . . to be applied in appropriate circumstances." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979).

4. The difficulty in applying the criterion has been commented upon by the First, Second, Third, Seventh, Tenth and District of Columbia Circuits,* and has led to criti-

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* *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574, 583 n.28 (3d Cir. 1979); *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 138-39 (D.C.Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *R. I. Committee on Energy* v. *General Services Administration*, 561 F.2d 397, 402 (1st Cir. 1977); *Cotovsky-Kaplan Physical Therapy Assoc., Ltd.* v. *United States*, 507 F.2d 1363, 1365 (7th Cir. 1975); *Sneaker Circus, Inc.* v. *Carter*, 457 F.Supp. 771, 780 n.7 (E.D.N.Y. 1978), *aff'd*, 614 F.2d 1290 (2d Cir. 1979); *Hiatt Grain & Feed, Inc.* v. *Bergland*, 446 F.Supp. 457, 469 (D.Kan. 1978); *aff'd*, 602 F.2d 929 (10th Cir. 1979); *Colligan* v. *Activities Club of New York, Ltd.*, 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971). *See also Pacemaker Monitor Corp.* v. *United States*, 440 F.Supp. 473, 483-85 (S.D.Fla. 1977).

cism by several commentators.* Indeed, the difficulty has prompted the Third Circuit to limit its application of the criterion, and the Eighth Circuit has expressed its preference for a standing analysis in which the criterion is not considered.**

5. A conflict exists among the circuits with respect to the proper means of determining the relevant "zone of interests." The District of Columbia Circuit has decided, at least with respect to the Internal Revenue Code, that only the specific section of the statute allegedly violated should be examined,*** while most courts look to the statute as a whole,† or to other statutes which were intended

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* K. Davis, *Administrative Law Treatise* (Supp. 1980), § 22.02-11, at 175-78; K. Davis, *Standing, 1976*, 72 N.W.U.L. Rev. 69, 81 (1976); L. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 495-97 (1974); R. Sedler, *Standing, Justiciability, and All That: A Behavorial Analysis*, 25 Vand. L. Rev. 479, 484-87 (1972); K. Davis, *The Liberalized Law of Standing*, 37 U.Chi. L. Rev. 450 (1970).

** *Local 2855, AFGE (AFL-CIO)* v. *United States, supra*, 602 F.2d at 582-83 n.28 (3d Cir. 1979); *Park View Heights Corporation* v. *City of Black Jack*, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972). *See also Merriam* v. *Kunzig*, 476 F.2d 1233, 1242 n.7 (3d Cir.), *cert. denied sub nom. Gateway Center Corp.* v. *Merriam*, 414 U.S. 911 (1973).

*** "[A]s a general rule, we believe that the particular statutory section [allegedly violated] should be the focus of analysis when applying the zone test." *Tax Analysts & Advocates* v. *Blumenthal, supra*, 566 F.2d at 141. Although this analysis also conflicts with this Court's reference to ". . . the statutory framework within which [a plaintiff's] claim arises . . .," *Gladstone, Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100 n.6; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1973), apparently it is the analysis which was employed by the district court in this action.

† *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 999 n.23 (D.C.Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 1274 (1980); *Port of Astoria, Or.* v. *Hodel*, 595 F.2d 467, 475 (9th Cir. 1979); *National State Bank of Elizabeth, N.J.* v. *Smith*, 591

by Congress to be construed in harmony with the one allegedly violated.* That conflict is exemplified in the proceedings below in this case.

6. The district court analyzed the "zone of interests" reflected in the citizenship requirement of Title XI, the violation of which is the basis of the illegality of MarAd's approval of National as a Title XI applicant and demise charterer. 46 U.S.C. §§ 1244(c), 1271(b), 1273(a)(1), 1274(a); 46 C.F.R. §§ 221.7(a), 298.10(a) (1979). It held that the citizenship requirement served only a purpose of national defense, and did not protect petitioner's asserted interest in remaining free of foreign competition in the coastwise trade. Petitioner respectfully submits that the district court not only erroneously applied the zone

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F.2d 223, 232 (3d Cir. 1979) and cases there cited; *R. I. Committee on Energy* v. *General Services Administration, supra,* 561 F.2d at 401 (1st Cir. 1977); *Robinson* v. *Knebel,* 550 F.2d 422, 424 (8th Cir. 1977); *Rodeway Inns of America, Inc.* v. *Frank,* 541 F.2d 759, 765 (8th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); *Clinton Community Hospital Corp.* v. *Southern Md. Medical Center,* 510 F.2d 1037, 1038 (4th Cir.), *cert. denied,* 422 U.S. 1048 (1975); *Ray Baille Trash Hauling, Inc.* v. *Kleppe,* 477 F.2d 696, 701 (5th Cir. 1973), *cert. denied,* 415 U.S. 914 (1974); *Colligan* v. *Activities Club of New York, Ltd., supra,* 442 F.2d at 691-92 (2d Cir.), *cert. denied,* 404 U.S. 1004 (1971); *Haitt Grain & Feed, Inc.* v. *Bergland, supra,* 446 F.Supp. at 469; *American Maritime Ass'n* v. *Blumenthal,* 458 F.Supp. 849, 856 (D.D.C. 1977), *aff'd,* 590 F.2d 1159 (D.C.Cir. 1978), *cert. denied,* 441 U.S. 943 (1979). *Compare, Simon* v. *Eastern Ky. Welfare Rights Org., supra,* 426 U.S. at 59 n.8.

* *See Armco Steel Co.* v. *Stans,* 303 F.Supp. 262, 268 (S.D.N.Y. 1969), *aff'd,* 431 F.2d 779, 784 (2d Cir. 1970). *Compare, Gladstone, Realtors* v. *Village of Bellwood, supra,* 441 U.S. at 100 n.6; *Simon* v. *Eastern Ky. Welfare Rights Org., supra,* 426 U.S. at 39 n.19. The court of appeals did not refer to its prior decision in *Armco* in its order in this case. It is not clear whether the court intended to overrule its standing holding in *Armco,* however, since it decided this case in a summary order, thereby prohibiting its citation in any unrelated matter. Local Rule § 0.23.

of interests criterion, but that its finding regarding the purpose of the citizenship requirement failed to follow this Court's holding in *Central Vt. Transportation Co.* v. *Durning, supra.* Although the court of appeals affirmed the lower court's denial of standing, its application of the "zone of interests" criterion bears no relationship to that of the district court. The court of appeals applied the zone of interests criterion by purporting to identify the interests protected or regulated by Tile XI as a whole, although it apparently considered the purposes and policies set forth in 46 U.S.C. §§ 861 and 1101 and the enacting clause of the 1938 Act, of which Title XI was a part, to be irrelevant to its analysis. Its finding that the Title XI program was intended only to facilitate private financing of ship construction, was based exclusively on a statement in a House Committee report with respect to a bill to amend certain procedural sections of Title XI,* none of which is in issue in this action. Exclusive reliance on such a Committee report to irrelevant amendments is apparently unprecedented in the application of the "zone of interests" analysis, and is unsupported by any standing holding of this Court.**

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* The court of appeals' conclusion, at pages 2-3 of its decision, that Title XI was intended only to facilitate private financing of ship construction, was based exclusively on a statement in H.R. Rep. No. 1042, 83d Cong., 1st Sess. at 1 (1953), that "[t]he purpose of the bill is to encourage the use of private capital in the financing of ship construction." That bill, H.R. 6441, became Pub. L. No. 288, 67 Stat. 626, 83d Cong., 1st Sess. (1953), and was purely amendatory to certain sections of Title XI, none of which are in issue in this action. Although the 1953 procedural amendments were intended to facilitate administration of the Title XI program, they are not indicative of the purpose of the program itself. *See Seatrain Shipbuilding Corp.* v. *Shell Oil Co., supra,* 100 S.Ct. at 807-808.

** To the extent any statement in the House Committee report conflicts with the enacting clause of Pub. L. No. 75-705, *supra,* in which Title XI was enacted in 1938, the court of appeals' re-

7. This Court has long held that all the shipping regulation statutes, including the Merchant Marine Act of 1920, are intended to give effect to the United States' oldest policy, protecting its merchant marine from foreign competition in the domestic trade. *Central Vt. Transportation Co.* v. *Durning, supra,* 294 U.S. at 38-39. Most recently, this Court recognized that the financial assistance programs under the Merchant Marine Act of 1936, as amended, including the Title XI program, were intended to further that policy by providing financial assistance to United States citizens while denying it to their foreign competition. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co., supra,* 100 S.Ct. at 802-03, 808. Although the court of appeals cited the *Seatrain* decision, it is submitted that that decision not only fails to support the court of appeals' conclusion regarding the limited purpose of Title XI, but rather supports the position of petitioner. No respondent disputed below that petitioner's competitive interests are within the "zone" protected by the statutory provisions regulating the operation of the Dredge. 46 U.S.C. §§ 802, 861 and 883. Therefore, if those provisions of the Merchant Marine Act of 1920 are relevant to determination of the proper "zone of interests" in this case, petitioner's standing under the criterion is conclusively established.

8. Because the "zone of interests" criterion is the only bar to petitioner's standing to bring this action,* it is

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liance on the report demonstrates the wisdom of this Court's recognition that ". . . the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348-49 (1963); *United States* v. *Price,* 361 U.S. 304, 313 (1960).

* As discussed in the statement of facts, *supra,* the district court properly assumed the truth of petitioner's allegation of future economic and competitive injury, supported by an uncontroverted

submitted that this Court should grant this petition in order to resolve the evident conflict regarding the criterion in the decisions below, as well as that among the Circuits, and to decide the important issue of the proper role and application of the criterion for standing under 5 U.S.C. § 702.

9. Not only does the case at bar present an important standing issue, but the outcome of this case will affect the future of the American domestic dredging industry as a whole. The National application declares that it was prompted by the Rivers and Harbors Improvements Act of 1978, Pub. L. No. 95-269, 92 Stat. 218 (1978), (33 U.S.C. §§ 622, 624 (1976) (Supp. II 1978), which was intended to encourage investment by Americans in privately owned hopper dredges, by increasing the number of the Corps of Engineers' dredging projects required to be let to private bid. Sen. Rep. No. 95-722, 95th Cong., 1st Sess., at 2, reproduced at 1978 U.S. Code, Cong. and Admin. News at 652. At the time of its enactment, Congress was concerned

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affidavit, (R.3, Lemmerhirt affidavit), and found that the constitutional requirement of injury in fact was satisfied. That finding was not disturbed by the court of appeals. Because the private respondents have admitted a substantial likelihood that the relief sought herein would terminate their project, it is clear that petitioner's injury is redressable. (R.17, Brown affidavit, ¶ 17; R.18, Brunner affidavit, ¶¶ 6, 7; R.19, Waldorf affidavit, ¶ 8). It is also clear that the asserted competitive injury flows directly from the Title XI assistance sought to be enjoined, since the National application specified petitioner's vessel. Manhattan Island, as its principal competition, and the government respondents based their preliminary approval of the Title XI application on their finding that the Dredge would in fact successfully compete with petitioner. (R.1, Exhibit "1", National Application, at 23; R.16, private defendants' statement of uncontroverted facts, ¶ 1). Thus, the requirements of injury in fact, causally related to the challenged action and redressable by the relief sought are clearly present. Moreover, petitioner's success on the merits is more than probable. *See* ¶ 2, *supra*.

about ". . . the danger of foreign dredging taking over U.S. hopper dredge capability . . ." as a result of the program contemplated in the Act. *See Contract Dredging: Hearing on H.R. 7744 before the Subcomm. on Water Resources of the Senate Comm. on Environment and Public Works,* 95th Cong., 2d Sess., at 32-33, 52 (1978). It was given assurances by representatives of the American dredging industry, including Williams-McWilliams, as well as the Corps of Engineers, that the citizenship requirements of Title XI and related statutes, the violation of which have given rise to this action, limit foreign participation in American dredging firms to 25% and thus eliminate this danger. *Id.* Yet the dredge which is the subject of this action, the largest, most technologically advanced hopper dredge in the market, will be used solely by Stuyvesant, a non-citizen, for the benefit of Bos Kalis, also a non-citizen, primarily to perform contracts pursuant to the program fostered by the Rivers and Harbors Improvements Act, contrary to the assurances given Congress. If, by means of Title XI assistance, the largest foreign dredging firm obtains the benefits of the Corps program under the Rivers and Harbors Improvements Act, it is apparent that the goal of that Act will be thwarted, and, as Congress realized, American firms will be discouraged from making the substantial investments which the Act was intended to encourage.* Whether petitioner has standing to pursue the action at bar is, therefore, an issue, the outcome of which will significantly affect the future of the

* Certainly petitioner would not have invested, as it did, many millions of dollars, and obligated itself to the extent of nearly $27,000,000 under the Title XI program, for new hopper dredges in order to participate in the Rivers and Harbors Improvements Act program without the protection from foreign competition afforded by Title XI and related statutes. 46 U.S.C. §§ 802, 861, 883, 1101, 1244(c), 1271(b), 1273(a) and 1274(a).

Corps of Engineers dredging program and the entire American dredging industry.

10. Absent judicial review of the decision below, the purpose of the review provisions of the Administrative Procedure Act will be frustrated. As this Court noted in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 n.2 (1967), "[t]o preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it." *See American Fed'n of Gov't Employees, Local 1858* v. *Callaway*, 398 F.Supp. 176, 187 (N.D. Ala. 1975). And "a primary purpose of judicial review of administrative action is to insure the integrity of the decision making process," *Williams* v. *Robinson*, 432 F.2d 637, 642 (D.C. Cir. 1970), as well as to "check illegal and arbitrary administrative action." *DiCostanzo* v. *Willard*, 165 F.Supp. 533, 538 (E.D.N.Y. 1958). In short, "[t]he courts stand between the citizen and administrative officers." *American President Lines* v. *Federal Maritime Board*, 112 F.Supp. 346, 349 (D.D.C. 1953). At bar, however, if petitioner is denied standing despite the lack of any clear indication of intent to preclude reviewability, the effect will be to insulate the actions of MarAd from any judicial scrutiny. It is no answer to say, as did the district court here, after assuming a violation of the citizenship provision by MarAd, (R.44, at 6), that it "is the Attorney General's responsibility to see that it is cleared up," (*id.*, at 7), for it is the Department of Justice which is defending the legality of the agency's acts in this instance. Thus, petitioner will be denied the protection of judicial review of agency action, the integrity of which it has attacked, and which will cause it great economic harm.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

STANLEY J. NORTON
Attorney for Petitioner,
Great Lakes International, Inc.
Norton & Christensen
60 Erie Street, P.O. Box 308
Goshen, New York 10924
(914) 294-7949

HENRY N. CHRISTENSEN, JR.
DANIEL J. DONOHUE
MARIE L. MCCANN
Of Counsel

APPENDIX

Appendix "A"

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of June, one thousand nine hundred and eighty.

UNITED STATES COURT OF APPPEALS
SECOND CIRCUIT
FILED JUN 16 1980
A. Daniel Fusaro, Clerk

Present:

HON. THOMAS J. MESKILL,
HON. JAMES L. OAKES,
Circuit Judges.

HON. DUDLEY B. BONSAL,
District Judge.

80-6053

GREAT LAKES INTERNATIONAL, INC.,
Plaintiff-Appellant,

v.

SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellees.

Appendix "A"

ORDER

Great Lakes International, Inc. ("Great Lakes") instituted this action on December 19, 1979 against the Maritime Administration and various private defendants. Great Lakes seeks review of a conditional commitment by the Maritime Administration to issue a federal guarantee in aid of the construction of a suction hopper dredge by the private defendants. By order dated March 12, 1980, the district court granted summary judgment dismissing the complaint on the ground that Great Lakes lacked standing. We affirm.

On March 2, 1979, National Dredging, Inc. applied to the Maritime Administration pursuant to Title XI of the Merchant Marine Act of 1936, 46 U.S.C. § 1271, *et seq.* ("Title XI"), for a federal guarantee in aid of the construction of a suction hopper dredge. By letter dated November 5, 1979, the Maritime Administration issued a conditional commitment covering a federal guarantee with respect to the suction hopper dredge. (The applicant was United States Trust Company of New York, which had been substituted for National Dredging, Inc.)

Great Lakes, through its subsidiaries, has received approximately $26,800,000 in Title XI guarantees in aid of the construction or purchase of three vessels, including two suction hopper dredges. Great Lakes is currently the only United States company operating suction hopper dredges.

In challenging the guarantee with respect to the suction hopper dredge, Great Lakes alleges that National Dredging, Inc. does not meet the citizenship requirement for receiving Title XI assistance and charges that the guarantee will "undercut plaintiff's position in the domestic dredging industry and result in loss of business to plaintiff with consequent great economic harm to it."

Appendix "A"

By order dated March 12, 1980, the United States District Court for the Southern District of New York, Whitman Knapp, Judge, granted defendants' cross motion for summary judgment and dismissed the complaint on the ground that Great Lakes lacked standing.

To have standing, a plaintiff must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). *Accord, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979).

The House report on Title XI states that "[t]he purpose of the bill is to encourage the use of private capital in the financing of ship construction." H.R. Rep. No. 1042, 83d Cong., 1st Sess. 2433 (1953). *See Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 100 S. Ct. 800, 807-808 (1980). Great Lakes' interest in restricting competition is not an interest covered by Title XI. Great Lakes therefore has no standing to bring this action.

The order of the district court is affirmed with costs.

/s/ James L. Oakes,
/s/ Thomas J. Meskill,
Circuit Judges.

/s/ Dudley B. Bonsal,
District Judge.

Appendix "B"

79 Civ. 6869

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GREAT LAKES INTERNATIONAL, INC.,

Plaintiff,

—v—

SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.,

Defendants.

New York, New York
March 12, 1980

Before:

HON. WHITMAN KNAPP,

District Judge.

APPEARANCES:

STANLEY J. NORTON
DANIEL J. DONOHUE
ROY G. BOWMAN
HOPEWELL H. DARNEILLE III
JOSEPH N. RENDINI
ALAN J. HRUSKA
THOMAS J. SWEENEY
STANLEY SHER
TWILA L. PERRY
ALLAN R. FREEDMAN

(Case called.)

Appendix "B"

The Court: This is a motion for summary judgment on various grounds. I had the good fortune to have a jury case settled and so, I spent yesterday and part of the day before going through the voluminous, and I may say expert, papers in this case.

I have come to the reasonably settled conclusion that the plaintiff has no standing and I think what I will do is put on the record my general feelings for those conclusions and let the plaintiff try to argue me out of it and, if he fails, that will be the judgment of the Court and that will put everybody in a position to get up to the 17th Floor, which ought to be a very simple case because I am not passing on any other question. And if the Court of Appeals decides I am wrong, then we will be back together again and then I will pass on the other questions.

I may say that now you won't find me as ignorant as you did the last time you were here.

For the purpose of my present thinking, I assume the truth of all the allegations in the plaintiff's complaint and I also assume injury-in-fact, i.e., if Congress had intended to create a monopoly, the simple allegation by a protected monopolist that someone was about to compete would carry with it a presumption of injury, and where arguing a preliminary injuncion motion, then it might be relevant to determine how immediate that injury was, but on the summary judgment motion, it would seem to me if Congress had intended that this plaintiff be protected from competition, the mere assertion that competition was about to occur would be sufficient to establish the threat of injury.

So, the whole "standing" question seems to me to boil down to whether the plaintiff is within the zone of interest, as the Courts have defined it. As to that, it seems to me clear that there is no evidence that Congress, in enacting

Title XI, intended to protect anyone from competition or to create any monopolies.

In this respect, the situation is entirely different from the one presented by Title V, which was at issue in this recent Supreme Court case, Seatrain Shipbuilding Corporation et al versus Shell Oil Company, et al, No. 78-1651, decided February 20, 1980.

In that case, standing was not contested; it was assumed, But in Title V, which was involved in that case, the Congress, in authorizing the subsidies for ships to be used in foreign commerce, was acutely aware of the injustice that would result if those subsidized ships were allowed to compete with the unsubsidized domestic, i.e., coastal, fleet. Consequently, these unsubsidized shipowners were clearly within the "zone of interest" and had standing to challenge any deviation from the congressional purpose.

The objective of Title XI, however, is simply to build up a strong United States Merchant Fleet and to create employment for American seamen and American shipyards. The citizenship requirements for owners and operators are designed to make sure that the United States would ultimately control the resulting fleet, especially in times of national crisis or war. To the extent that such requirements have not been complied with, and for the purpose of this "standing" discussion we have to assume that they were not complied with, the entire country is the loser and plaintiff is no differently situated than any other citizen.

There is no suggestion in Title XI that Congress intended to give one subsidized shipowner, such as plaintiff, any voice in deciding what its competition should be.

To go back to the Shell Oil case, if say, some other subsidized shipowner was complaining about favors being done

to the petitioner in that case, in my view, such other shipowners would clearly not have had standing.

That is my tentative conclusion and I will hear any criticism you may have of it. Maybe you will persuade me I am wrong.

Mr. Norton: First of all, the plaintiff's contention is not that it doesn't want competition but—

The Court: It doesn't want competition from this fellow.

Mr. Norton: It doesn't want an illegal competitor to be competing with it.

The Court: It doesn't want competition from this fellow.

Mr. Norton: That's right.

Now, you talk about the purpose of the Act, 1101; you say it doesn't apply to Title XI, but I think your Honor might have missed the fact that in 1271, which is in Title XI, it brings in dredging into the whole Title XI procedure and benefits of Title XI by 1271—

The Court: What section? Just a minute.

Mr. Norton: 1271(a), I believe, your Honor.

The Court: "The term 'mortgage' includes a preferred mortgage?" Is that what you are referring to?

Mr. Norton: Referring to the fact that dredging is included as part of Title XI and the purpose of Title XI is to be certain that any guarantees by MARAD must only be given to a citizen as defined in 46 US Code—

The Court: That's perfectly clear. I am assuming that MARAD violated that provision. I am merely saying you do not have standing.

Mr. Norton: I understood that.

I am saying that we are entitled to compete with American companies and, incidentally, the government in its affidavit—rather in its brief, says, and I will try to find it here—at page 13 of that brief, I quote:

Appendix "B"

"Indeed, it is clear that in the future, the Maritime Administration will approve applications for Title XI guarantees for other companies newly seeking to enter into the dredging business. Plaintiff will have to compete with other companies, regardless of the outcome of this case."

We say, fine; that's just what we are asking for. What MARAD has done and what the applicant, National Dredging Company, has done, they have come in here acting, pretty clearly to me, acting for a foreign dredging company which cannot—

The Court: I am assuming for the purpose of this argument that what MARAD did might very well get them all impeached, but all that I am saying is that you are not within the zone of interest and you can't sue them.

Mr. Norton: I say under 1271 I am, your Honor. Title 46—

The Court: All right. Well, I considered that argument and, as Mr. Justice Stone once said about my superiors up on the 17th Floor, they are often in error but never in doubt—and that is where I find myself: Maybe I am in error; I am not in doubt.

Mr. Norton: I would point out, your Honor, that when 1101 was added in 1936, the Act which included it was entitled "To Amend the Merchant Marine Act, 1936; to further promote the merchant marine policy therein declared, and for other purposes.

So that it is clear that under the unified single purpose declared in 1101(c), the government has a question of whether we are arguably within the zone of protection.

The Court: Well, I don't think you are any different any any (sic) other citizen. If these people are violating the law, all the citizens of the United States are suffering from

it and that is the Attorney General's responsibility to see that it is cleared up, not mine.

Mr. Norton: I think I have said it all, your Honor. I have said it in the papers and there is no point in repeating myself. It's like flogging a dead horse.

The Court: Well, all I can say is that I hope you don't convince the Court of Appeals that you are right, because to be quite frank, I don't want this back here.

Mr. Norton: We have different wishes in that regard. Could we have a stay, though, pending the appeal?

The Court: Well, I think—it seems to me you ought to have some sort of a stay, but I will hear the other side on the question. It seems to me you have told me that up to April 1st you are not hurting and that will give the Court of Appeals plenty of time to make a stay or not.

Mr. Hruska: Exactly, your Honor. I have no objection to a stay pending an application for a stay but I would oppose anything beyond that, because that might get us into the timing problem.

The Court: Well, my thought was to make a stay pending application for a stay until April 1. I give that much time because the Court of Appeals' Clerk's office likes not to have pressure if there is no need for pressure.

Mr. Hruska: Your Honor, could we have excepted from that stay our ability to submit papers to MARAD?

The Court: Yes. I see no reason why it should not be excepted from that stay, the ability to submit any papers to MARAD that you want to, on the understanding that MARAD will not act on those papers until April 1st so the stay shall sort of have been lifted.

Mr. Hruska: Could we have a limited exception to that matter of acting in the sense that we would like to have MARAD permitted to act on this question that newly

arose last night thaat I reported to your Honor's clerk this morning, and reported to Mr. Norton?

The Court: Put it on the record.

Mr. Hruska: That is the matter of the citizenship of the United States Corporation Company of Delaware.

The Court: Well, MARAD can do anything it wants to, except take final action on the application. That would seem to be satisfactory.

Mr. Hruska: That's fine.

The Court: They want to tidy up their act in any way they may. As long as they don't take final action.

Mr. Norton: Your Honor, may it also be directed that if they change any of the others or change other papers other the one to which he eludes, that we be notified of that?

The Court: I assume they will do that in due course.

Mr. Norton: I don't know whether they are going to submit a whole new setup.

Mr. Hruska: It's certainly not contemplated right now to submit a whole new setup.

The Court: I don't want to get into the business of regulating the MARAD procedures. All I am doing is saying that MARAD should take no final action up to and including April 1st, unless the stay is lifted by the Court of Appeals.

What notice MARAD requires everybody to give everybody else is MARAD's business, not mine.

I will endorse the motion papers that the motion for summary judgment is granted for the reasons stated on the record in open court and that will be filed within twenty minutes and you can start the procedures working.

(Matter concluded.)

Appendix "C"

RIVERS AND HARBORS IMPROVEMENTS ACT OF 1978

33 U.S.C. § 622. Contracts, etc., for implementation of projects for improvements and for dredging and related work by private industry; performance of work by federally owned fleet and transition to use of private industry; requirements, standards, and study relating to transition and accompanying reduction of federally owned fleet

(a) The Secretary of the Army, acting through the Chief of Engineers (hereinafter referred to as the "Secretary"), in carrying out projects for improvement of rivers and harbors (other than surveys, estimates, and gagings) shall, by contract or otherwise, carry out such work in the manner most economical and advantageous to the United States. The Secretary shall have dredging and related work done by contract if he determines private industry has the capability to do such work and it can be done at reasonable prices and in a timely manner. During the four-year period which begins on April 26, 1978, the Secretary may limit the application of the second sentence of this subsection for work for which the federally owned fleet is available to achieve an orderly transition to full implementation of this subsection.

(b) As private industry reasonably demonstrates its capability under subsection (a) of this section to perform the work done by the federally owned fleet, at reasonable prices and in a timely manner, the federally owned fleet shall be reduced in an orderly manner, as determined by the Secretary, by retirement of plant. To carry out emergency and national defense work the Secretary shall retain

only the minimum federally owned fleet capable of performing such work and he may exempt from the provisions of this section such amount of work as he determines to be reasonably necessary to keep such fleet fully operational, as determined by the Secretary, after the minimum fleet requirements have been determined. Notwithstanding the preceding sentence, in carrying out the reduction of the federally owned fleet, the Secretary may retain so much of the federally owned fleet as he determines necessary, for so long as he determines necessary, to insure the capability of the Federal Government and private industry together to carry out projects for improvements of rivers and harbors. For the purpose of making the determination required by the preceding sentence the Secretary shall not exempt any work from the requirements of this section. The minimum federally owned fleet shall be maintained to technologically modern and efficient standards, including replacement as necessary. The Secretary is authorized and directed to undertake a study to determine the minimum federally owned fleet required to perform emergency and national defense work. The study, which shall be submitted to Congress within two years after April 26, 1978, shall also include preservation of employee rights of persons presently employed on the existing federally owned fleet.

33 U.S.C. § 624. Limitation on improvement work by private contract—Determinations respecting comparison of private contract price with estimation of cost of performance or work by Government plant or by well-equipped contractor

(a) No works of river and harbor improvement shall be done by private contract—

(1) if the Secretary of the Army, acting through the Chief of Engineers, determines that Government plant is reasonably available to perform the subject work and the contract price for doing the work is more than 25 per centum in excess of the estimated comparable cost of doing the work by Government plant; or

(2) in any other circumstances where the Secretary of the Army, acting through the Chief of Engineers, determines that the contract price is more than 25 per centum in excess of what he determines to be a fair and reasonable estimated cost of a well-equipped contractor doing the work.

CONSIDERATIONS INVOLVED IN DETERMINATIONS OF ESTIMATION OF COST OF PERFORMANCE OF WORK BY GOVERNMENT PLANT

(b) In estimating the comparable cost of doing the work under subsection (a)(1) of this section by Government plant the Secretary of the Army, acting through the Chief of Engineers shall, in addition to the cost of labor and materials, take into account proper charges for depreciation of plant, all supervising and overhead expenses, interest on the capital invested in the Government plant (but the rate of interest shall not exceed the maximum prevailing rate being paid by the United States on current issues of bonds or other evidences of indebtedness) and such other Government expenses and charges as the Chief of Engineers determines to be appropriate.

CONSIDERATIONS INVOLVED IN DETERMINATIONS OF ESTIMATION OF COST OF PERFORMANCE OF WORK BY WELL-EQUIPPED CONTRACTOR

(c) In determining a fair and reasonable estimated cost of doing work by private contract under subsection (a)(2)

of this section, the Secretary of the Army, acting through the Chief of Engineers, shall, in addition to the cost of labor and materials, take into account proper charges for depreciation of plant, all expenses for supervision, overhead, workmen's compensation, general liability insurance, taxes (State and local), interest on capital invested in plant, and such other expenses and charges the Secretary of the Army, acting through the Chief of Engineers, determines to be appropriate.

46 U.S.C. § 802. Corporation, partnership or association as citizen

(a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or

(b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

46 U.S.C. § 808. Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade

Any vessel purchased, chartered, or leased from the Secretary of Commerce, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of

the United States and entitled to the benefits and privileges appertaining thereto: *Provided,* That foreign-built vessels admitted to American registry or enrollment and license under this chapter, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the Secretary to any person a citizen of the United States, as provided in this chapter, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

Every vessel purchased, chartered, or leased from the Secretary shall, unless otherwise authorized by the Secretary, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the Secretary of Commerce, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

* * *

Any such vessel, or any interest therein, chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or

operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both.

46 U.S.C. § 861. Purpose and policy of United States

It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a Merchant Marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this act, the Federal Maritime Commission and the Secretary of Commerce shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

46 U.S.C. § 883. Transportation of merchandise between points in other than domestic-built or rebuilt and documented vessels

No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise

(or a monetary amount up to the value thereof as determined by the Secretary of the Treasury to be recovered from any consignor, seller, owner, importer, consignee, agent or other person or persons so transporting or causing said merchandise to be transported), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: *Provided,* That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwide trade; . . . .

• • •

46 U.S.C. § 1101. Fostering development and maintenance of merchant marine

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of

serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

MERCHANT MARINE ACT OF 1938
AN ACT

To amend the Merchant Marine Act, 1936, to further promote the merchant marine policy therein declared, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 202 of the Merchant Marine Act, 1936, is amended by adding at the end thereof a new sentence to read as follows: "The Commission may, upon such terms and conditions as it may prescribe in accordance with sound business practice, make such extensions and accept such renewals of the notes and other evidences of indebtedness hereby transferred, and of the mortgages and other contracts securing the same, as it may deem necessary to carry out the objects of this Act."

* * *

§ 1, Pub. L. No. 75-705, 52 Stat. 953-54 (1938)

Appendix "C"

46 U.S.C. § 1244. Definitions

When used in this chapter—

* * *

(c) The words "citizen of the United States" include a corporation, partnership, or association only if it is a citizen of the United States within the meaning of section 802 of this title, and with respect to a corporation under subchapter VI of this chapter, all directors of the corporation are citizens of the United States, and, in the case of a corporation, partnership, or association operating a vessel on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States the amount of interest required to be owned by a citizen of the United States shall be not less than 75 per centum.

* * *

TITLE XI OF THE MERCHANT MARINE ACT OF 1936, AS AMENDED

46 U.S.C. § 1271. Definitions

As used in this subchapter—

(a) The term "mortage" includes a preferred mortgage as defined in the Ship Mortgage Act, 1920, as amended, on any vessel of the United States (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel of less than twenty-five gross tons), and a mortgage on such a vessel which will become a preferred mortgage when recorded and endorsed as required by the Ship Mortgage Act, 1920, as amended;

(b) The term "vessel" includes all types, whether in existence or under construction, of passenger cargo and combination passenger-cargo carrying vessels, tankers,

tugs, tow-boats, barges and dredges which are or will be documented under the laws of the United States, fishing vessels whose ownership will meet the citizenship requirements for documenting vessels in the coastwide trade within the meaning of section 802 of this title, floating drydocks which have a capacity of thirty-five thousand or more lifting tons and a beam of one hundred and twenty-five feet or more between the wing walls and oceanographic research or instruction or pollution treatment, abatement or control vessels owned by citizens of the United States;

(c) The term "obligation" shall mean any note, bond, debenture, or other evidence of indebtedness (exclusive of notes or other obligations issued by the Secretary of Commerce pursuant to section 1275(d) of this title and obligations eligible for investment of funds under sections 1272 and 1279a(d) of this title), issued for one of the purposes specified in section 1274(a) of this title;

(d) The term "obligor" shall mean any party primarily liable for payment of the principal of or interest on any obligation;

(e) The term "obligee" shall mean the holder of an obligation;

(f) The term "actual cost" of a vessel as of any specified date means the aggregate, as determined by the Secretary of Commerce, of (i) all amounts paid by or for the account of the obligor on or before that date, and (ii) all amounts which the obligor is then obligated to pay from time to time thereafter, for the construction, reconstruction, or reconditioning of such vessel;

(g) The term "depreciated actual cost" of a vessel means the actual cost of the vessel depreciated on a straightline

basis over the useful life of the vessel as determined by the Secretary of Commerce, not to exceed twenty-five years from the date the vessel was delivered by the shipbuilder, or, if the vessel has been reconstructed or reconditioned, the actual cost of the vessel depreciated on a straightline basis from the date the vessel was delivered by the shipbuilder to the date of such reconstruction or reconditioning on the basis of the original useful life of the vessel and from the date of such reconstruction or reconditioning on a straightline basis and on the basis of a useful life of the vessel determined by the Secretary of Commerce, plus all amounts paid or obligated to be paid for the reconstruction or reconditioning depreciated on a straightline basis and on the basis of a useful life of the vessel determined by the Secretary of Commerce; and

(h) The terms "construction", "reconstruction", or "reconditioning" shall include, but shall not be limited to, designing, inspecting, outfitting and equipping.

46 U.S.C. § 1272. Federal Ship Financing Fund

There is created a Federal Ship Financing Fund (hereinafter referred to as the Fund) which shall be used by the Secretary of Commerce as a revolving fund for the purpose of carrying out the provisions of this subchapter, and there shall be allocated to such Fund the sum of $1,000,000 out of funds made available to the Secretary of Commerce under the appropriation authorized by section 1279 of this title. Moneys in the Fund shall be deposited in the Treasury of the United States to the credit of the Fund or invested in bonds or other obligations of, or guaranteed as to principal and interest by, the United States.

Appendix "C"

46 U.S.C. § 1273. Authorization of Secretary to guarantee obligations

PRINCIPAL AND INTEREST

(a) The Secretary of Commerce, upon application by a citizen of the United States, is authorized to guarantee, and to enter into commitments to guarantee, the payment of the interest on, and the unpaid balance of the principal of, any obligation which is eligible to be guaranteed under this subchapter.

SECURITY INTEREST

(b) No obligation shall be guaranteed under this subchapter unless the obligor conveys or agrees to convey to the Secretary of Commerce such security interest, which may include a mortgage or mortgages on a vessel or vessels, as the Secretary of Commerce may reasonably require to protect the interests of the United States.

AMOUNT OF GUARANTEE; PERCENTAGE LIMITATIONS; DETERMINATION OF ACTUAL COST OF VESSEL

(c) The Secretary of Commerce shall not guarantee the principal of obligations in an amount in excess of 75 per centum, or 87½ per centum, whichever is applicable under section 1274 of this title, of the amount, as determined by the Secretary of Commerce which determination shall be conclusive, paid by or for the account of the obligor for the construction, reconstruction, or reconditioning of a vessel or vessels with respect to which a security interest has been conveyed to the Secretary of Commerce, unless the obligor creates an escrow fund as authorized by section 1279a of this title, in which case the Secretary of Commerce may guarantee 75 per centum or 87½ per centum, whichever is

applicable under section 1274 of this title, of the actual cost of such vessel or vessels.

PLEDGE OF UNITED STATES

(d) The full faith and credit of the United States is pledged to the payment of all guarantees made under this subchapter with respect to both principal and interest, including interest, as may be provided for in the guarantee, accruing between the date of default under a guaranteed obligation and the payment in full of the guarantee.

PROOF OF OBLIGATIONS

(e) Any guarantee, or commitment to guarantee, made by the Secretary of Commerce under this subchapter shall be conclusive evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee, or commitment to guarantee, so made shall be incontestable.

LIMITATION ON OUTSTANDING AMOUNT

(f) The aggregate unpaid principal amount of the obligations guaranteed under this section and outstanding at any one time shall not exceed $10,000,000,000.

46 U.S.C. § 1274. Eligibility for guarantee

PURPOSE OF OBLIGATIONS

(a) Pursuant to the authority granted under section 1273(a) of this title, the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest of an obligation which aids in—

(1) financing, including reimbursement of an obligor for expenditures previously made for, construction, re-

construction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally for research, or for commercial use (A) in the coastwise or intercoastal trade; (B) on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States; (C) in foreign trade as defined in section 1244 of this title for purposes of subchapter V of this chapter; (D) in the fishing trade or industry; or (E) with respect to floating drydocks, in the construction, reconstruction, reconditioning, or repair of vessels: *Provided, however,* That no guarantee shall be entered into pursuant to this paragraph (a)(1) later than one year after delivery, or redelivery in the case of reconstruction or reconditioning of any such vessel unless the proceeds of the obligation are used to finance the construction, reconstruction, or reconditioning of a vessel or vessels, or facilities or equipment pertaining to marine operations;

(2) financing the purchase of vessels theretofore acquired by the Fund under the provisions of section 1275 of this title and reconditioning and reconstructing such vessels;

(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to subchapter V of this chapter; or

(4) refinancing existing obligations issued for one of the purposes specified in (1), (2), or (3) whether or not guaranteed under this subchapter, including, but not limited to, short-term obligations incurred for the purpose of obtaining temporary funds with the view to refinancing from time to time.

Appendix "C"

CONTENTS OF OBLIGATIONS

(b) Obligations guaranteed under this subchapter—

(1) shall have an obligor approved by the Secretary of Commerce as responsible and possessing the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the vessel or vessels which serve as security for the guarantee of the Secretary of Commerce;

(2) subject to the provisions of paragraph (1) of subsection (c) of this section, shall be in an aggregate principal amount which does not exceed 75 per centum of the actual cost or depreciated actual cost, as determined by the Secretary of Commerce, of the vessel which is used as security for the guarantee of the Secretary of Commerce: *Provided, however,* That in the case of a vessel, the size and speed of which are approved by the Secretary of Commerce, and which is or would have been eligible for mortgage aid for construction under section 1159 of this title (or would have been eligible for mortgage aid under section 1159 of this title except that the vessel was built with the aid of construction-differential subsidy and said subsidy has been repaid) and in respect of which the minimum down-payment by the mortgagor required by that section would be or would have been 12½ per centum of the cost of such vessel, such obligations may be in an amount which does not exceed 87½ per centum of such actual cost or depreciated actual cost: *Provided, further,* That the obligations which relate to a barge which is constructed without the aid of construction-differential subsidy, or, if so subsidized on which said subsidy has been repaid, may be in an aggregate principal

amount which does not exceed 87½ per centum of the actual cost or depreciated actual cost thereof: *Provided, further,* That in the case of any vessel to be used in the fishing trade or industry, such obligations may be in an aggregate principal amount which does not exceed 87½ per centum of the actual cost or depreciated actual cost of the vessel;

(3) shall have maturity dates satisfactory to the Secretary of Commerce but, subject to the provisions of paragraph (2) of subsection (c) of this section, not to exceed twenty-five years from the date of the delivery of the vessel which serves as security for the guarantee of the Secretary of Commerce or, if the vessel has been reconstructed or reconditioned, not to exceed the later of (i) twenty-five years from the date of delivery of the vessel and (ii) the remaining years of the useful life of the vessel as determined by the Secretary of Commerce;

(4) shall provide for payments by the obligor satisfactory to the Secretary of Commerce;

(5) shall bear interest (exclusive of charges for the guarantee and service charges, if any) at rates not to exceed such per centum per annum on the unpaid principal as the Secretary of Commerce determines to be reasonable, taking into account the range of interest rates prevailing in the private market for similar loans and the risks assumed by the Secretary of Commerce;

(6) shall provide, or a related agreement shall provide, that if the vessel used as security for the guarantee of the Secretary of Commerce is a delivered vessel, the vessel shall be in class A-1, American Bureau of

Shipping, or shall meet such other standards as may be acceptable to the Secretary of Commerce, with all required certificates, including but no limited to, marine inspection certificates of the United States Coast Guard, with all outstanding requirements and recommendations necessary for retention of class accomplished, unless the Secretary of Commerce permits a deferment of such repairs, and shall be tight, stanch, strong, and well and sufficiently tackled, appareled, furnished, and equipped, and in every respect seaworthy and in good running condition and repair, and in all respects fit for service; and

(7) may provide, or a related agreement may provide, if the vessel used as security for the guarantee of the Secretary of Commerce is a passenger vessel having the tonnage, speed, passenger accommodations and other characteristics set forth in subchapter V of this chapter, and if the Secretary of Commerce approves, that the sole recourse against the obligor by the United States for any payments under the guarantee shall be limited to repossession of the vessel and the assignment of insurance claims and that the liability of the obligor for any payments of principal and interest under the guarantee shall be satisfied and discharged by the surrender of the vessel and all right, title, and interest therein to the United States: *Provided*, That the vessel upon surrender shall be (i) free and clear of all liens and encumbrances whatsoever except the security interest conveyed to the Secretary of Commerce under this subchapter, (ii) in class, and (iii) in as good order and condition, ordinary wear and tear excepted, as when acquired by the obligor, except that any defi-

ciencies with respect to freedom from encumbrances, condition and class may, to the extent covered by valid policies of insurance, be satisfied by the assignment to the Secretary of Commerce of claims of the obligor under such policies.

SECURITY

(c)(1) The security for the guarantee of an obligation by the Secretary of Commerce under this subchapter may relate to more than one vessel and may consist of any combination of types of security. The aggregate principal amount of obligations which have more than one vessel as security for the guarantee of the Secretary of Commerce under this subchapter may equal, but not exceed, the sum of the principal amount of obligations permissible with respect to each vessel.

(2) If the security for the guarantee of an obligation by the Secretary of Commerce under this subchapter relates to more than one vessel, such obligation may have the latest maturity date permissible under subsection (b) of this section with respect to any of such vessels: *Provided,* That the Secretary of Commerce may require such payments of principal, prior to maturity, with respect to all related obligations as he deems necessary in order to maintain adequate security for his guarantee.

RESTRICTIONS

(d) No commitment to guarantee an obligation shall be made by the Secretary of Commerce unless he finds, at or prior to the time such commitment is made, that the property or project with respect to which the obligation will be executed will be, in his opinion, economically sound

and in the case of fishing vessels, that the purpose of the financing or refinancing is consistent with the wise use of the fisheries resources and with the development, advancement, management, conservation, and protection of the fisheries resources, and no obligation, unless made pursuant to a prior commitment, shall be guaranteed unless the Secretary of Commerce finds, at or prior to the time the guarantee becomes effective, that the property or project with respect to which the obligation is executed will be, in his opinion, economically sound and in the case of fishing vessels, that the purpose of the financing or refinancing is consistent with the wise use of the fisheries resources and with the development, advancement, management, conservation, and protection of the fisheries resources.

GUARANTEE FEES

(e) The Secretary of Commerce is authorized to fix a fee for the guarantee of an obligation under this subchapter. If the security for the guarantee of an obligation under this subchapter relates to a delivered vessel, such fee shall not be less than one-half of 1 per centum per annum nor more than 1 per centum per annum of the average principal amount of such obligation outstanding, excluding the average amount (except interest) on deposit in an escrow fund created under section 1279a of this title. If the security for the guarantee of an obligation under this subchapter relates to a vessel to be constructed, reconstructed, or reconditioned, such fee shall not be less than one-quarter of 1 per centum per annum nor more than one-half of 1 per centum per annum of the average principal amount of such obligation outstanding, excluding the average amount (except interest) on deposit in an

escrow fund created under section 1279a of this title. For purposes of this subsection (e), if the security for the guarantee of an obligation under this subchapter relates both to a delivered vessel or vessels and to a vessel or vessels to be constructed, reconstructed, or reconditioned, the principal amount of such obligation shall be prorated in accordance with the regulations prescribed by the Secretary of Commerce. Fee payments shall be made by the obligor to the Secretary of Commerce when moneys are first advanced under a guaranteed obligation and at least sixty days prior to each anniversary date thereafter. All fees shall be computed and shall be payable to the Secretary of Commerce under such regulations as the Secretary of Commerce may prescribe.

INVESTIGATION OF APPLICATIONS

(f) The Secretary of Commerce shall charge and collect from the obligor such amounts as he may deem reasonable for the investigation of applications for a guarantee, for the appraisal of properties offered as security for a guarantee, for the issuance of commitments, for services in connection with the escrow fund authorized by section 1279a of this title and for the inspection of such properties during construction, reconstruction, or reconditioning: *Provided,* That such charges shall not aggregate more than one-half of 1 per centum of the original principal amount of the obligations to be guaranteed.

DISPOSITION OF MONEYS

(g) All moneys received by the Secretary of Commerce under the provisions of sections 1271 to 1276 and 1279 of this title shall be deposited in the Fund.

Appendix "C"

ADDITIONAL REQUIREMENTS

(h) Obligations guaranteed under this subchapter and agreements relating thereto shall contain such other provisions with respect to the protection of the security interests of the United States (including acceleration and subrogation provisions and the issuance of notes by the obligor to the Secretary of Commerce), liens and releases of liens, payments of taxes, and such other matters as the Secretary of Commerce may, in his discretion, prescribe.

46 U.S.C. § 1275. Defaults

RIGHTS OF OBLIGEE

(a) In the event of a default, which has continued for thirty days, in any payment by the obligor of principal or interest due under an obligation guaranteed under this subchapter, the obligee or his agent shall have the right to demand, at or before the expiration of such period as may be specified in the guarantee or related agreements, but not later than ninety days from the date of such default, payment by the Secretary of Commerce of the unpaid principal amount of said obligation and of the unpaid interest thereon to the date of payment. Within such period as may be specified in the guarantee or related agreements, but not later than thirty days from the date of such demand, the Secretary of Commerce shall promptly pay to the obligee or his agent the unpaid principal amount of said obligation and unpaid interest thereon to the date of payment: *Provided,* That the Secretary of Commerce shall not be required to make such payment if prior to the expiration of said period he shall find that there was no default by the obligor in the payment of principal or

interest or that such default has been remedied prior to any such demand.

NOTICE OF DEFAULT

(b) In the event of a default under a mortgage, loan agreement, or other security agreement between the obligor and the Secretary of Commerce, the Secretary of Commerce may notify the obligee or his agent of such default and the obligee or his agent shall have the right to demand at or before the expiration of such period as may be specified in the guarantee or related agreements, but not later than sixty days from the date of such notice, payment by the Secretary of Commerce of the unpaid principal amount of said obligation and of the unpaid interest thereon. Within such period as may be specified in the guarantee or related agreements, but not later than thirty days from the date of such demand, the Secretary of Commerce shall promptly pay to the obligee or his agent the unpaid principal amount of said obligation and unpaid interest thereon to the date of payment.

SECRETARY TO COMPLETE, SELL OR OPERATE PROPERTY

(c) In the event of any payment by the Secretary of Commerce under subsection (a) or (b) of this section, the Secretary of Commerce shall have all rights in any security held by him relating to his guarantee of such obligations as are conferred upon him under any security agreement with the obligor. Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of property by the United States, the Secretary of Commerce shall have the right, in his discretion, to complete, recondition, reconstruct, renovate, repair, maintain, operate, charter, or

sell any property acquired by him pursuant to a security agreement with the obligor or may place a vessel in the national defense reserve. The terms of the sale shall be as approved by the Secretary of Commerce.

CASH PAYMENTS; ISSUANCE OF NOTES OR OBLIGATIONS

(d) Any amount required to be paid by the Secretary of Commerce pursuant to subsection (a) or (b) of this section, shall be paid in cash. If at any time the moneys in the Fund authorized by section 1272 of this title are not sufficient to pay any amount the Secretary of Commerce is required to pay by subsection (a) or (b) of this section, the Secretary of Commerce is authorized to issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of Commerce, with the approval of the Secretary of the Treasury. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of such notes or other obligations. The Secretary of the Treasury is authorized and directed to purchase any notes and other obligations to be issued hereunder and for such purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of such notes and obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired by him under this section. All

redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States. Funds borrowed under this section shall be deposited in the Fund and redemptions of such notes and obligations shall be made by the Secretary of Commerce from such Fund.

ACTIONS AGAINST OBLIGOR

(e) In the event of a default under any guaranteed obligation or any related agreement, the Secretary of Commerce shall take such action against the obligor or any other parties liable thereunder that, in his discretion, may be required to protect the interests of the United States. Any suit may be brought in the name of the United States or in the name of the obligee and the obligee shall make available to the United States all records and evidence necessary to prosecute any such suit. The Secretary of Commerce shall have the right, in his discretion, to accept a conveyance of title to and possession of property from the obligor or other parties liable to the Secretary of Commerce, and may purchase the property for an amount not greater than the unpaid principal amount of such obligation and interest thereon. In the event the Secretary of Commerce shall receive through the sale of property an amount of cash in excess of any payment made to an obligee under subsection (a) or (b) of this section and the expenses of collection of such amounts, he shall pay such excess to the obligor.

46 U.S.C. § 1276. Offenses and penalties

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that an obligation relating

to such loan or advance of credit shall be offered to or accepted by the Secretary of Commerce to be guaranteed, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage relating to an obligation guaranteed by the said Secretary of Commerce, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of said Secretary of Commerce under this subchapter, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income shall be guilty of a misdemeanor and punished as provided under the first paragraph of section 1228 of this title.

46 U.S.C. § 1279. Appropriations

There is authorized to be appropriated the sum of $1,000,000 and such further sums as may be necessary to carry out the provisions of this subchapter.

46 U.S.C. § 1279a. Escrow fund

CREATION

(a) If the proceeds of an obligation guaranteed under this subchapter are to be used to finance the construction, reconstruction, or reconditioning of a vessel or vessels which will serve as security for the guarantee of the Secre-

tary of Commerce, the Secretary of Commerce is authorized to accept and hold, in escrow under an escrow agreement with the obligor, a portion of the proceeds of all obligations guaranteed under this subchapter whose proceeds are to be so used which is equal to: (i) the excess of the principal amount of all obligations whose proceeds are to be so used over 75 per centum, or 87½ per centum, whichever is applicable under section 1274 of this title, of the amount paid by or for the account of the obligor for the construction, reconstruction, or reconditioning of the vessel or vessels; (ii) with such interest thereon, if any, as the Secretary of Commerce may require: *Provided,* That in the event the security for the guarantee of an obligation by the Secretary of Commerce relates both to a vessel or vessels to be constructed, reconstructed or reconditioned and to a delivered vesel or vessels, the principal amount of such obligation shall be prorated for purposes of this subsection (a) under regulations prescribed by the Secretary of Commerce.

DISBURSEMENT PRIOR TO TERMINATION OF ESCROW AGREEMENT

(b) The Secretary of Commerce shall, as specified in the escrow agreement, disburse the escrow fund to pay amounts the obligor is obligated to pay as interest on such obligations or for the construction, reconstruction, or reconditioning of the vessel or vessels used as security for the guarantee of the Secretary of Commerce under this subchapter, to redeem such obligations in connection with a refinancing under paragraph (4) of section 1274(a) of this title or to pay to the obligor at such times as may be provided for in the escrow agreement any excess interest deposits, except that if payments become due under the guarantee prior to the termination of the escrow agreement, all amounts in the escrow fund at the time such payments become due (including realized income which has not yet been paid to

the obligor) shall be paid into the Fund and (i) be credited against any amounts due or to become due to the Secretary of Commerce from the obligor with respect to the guaranteed obligations and (ii) to the extent not so required, be paid to the obligor.

DISBURSEMENT UPON TERMINATION OF ESCROW AGREEMENT

(c) If payments under the guarantee have not become due prior to the termination of the escrow agreement, any balance of the escrow fund at the time of such termination shall be disbursed to prepay the excess of the principal of all obligations whose proceeds are to be used to finance the construction, reconstruction, or reconditioning of the vessel or vessels which serve or will serve as security for such guarantee over 75 per centum or 87½ per centum, whichever is applicable under section 1274 of this title, of the actual cost of such vessel or vessels to the extent paid, and to pay interest on such prepaid amount of principal, and the remainder of such balance of the escrow fund shall be paid to the obligor.

INVESTMENT OF FUND

(d) The Secretary of Commerce may invest and reinvest all or any part of the escrow fund in obligations of the United States with such maturities that the escrow fund will be available as required for purposes of the escrow agreement.

PAYMENT OF INCOME

(e) Any income realized on the escrow fund shall, upon receipt, be paid to the obligor.

Appendix "C"

TERMS OF ESCROW AGREEMENT

(f) The escrow agreement shall contain such other terms as the Secretary of Commerce may consider necessary to protect fully the interests of the United States.

46 U.S.C. § 1279b. Rules and regulations

The Secretary of Commerce is authorized and directed to make such rules and regulations as may be deemed necessary or appropriate to carry out the purposes and provisions of this subchapter.

46 U.S.C. § 1280. Advances to fund

The Secretary of Commerce is authorized to advance to the Federal Ship Financing Fund from the "Vessel operations revolving fund", such amounts as may be required for the payment, pursuant to section 1275 of this title, of unpaid principal amounts of defaulted mortgages and loans and of unpaid interest thereon: *Provided,* That such advances shall be repaid to the "Vessel operations revolving fund" as soon as practicable consistent with the status of the Federal Ship Financing Fund: *Provided further,* That the total advances outstanding at any one time shall not exceed $10,000,000.

46 CFR § 221.7(a) (1979):

"The Department of Commerce, Maritime Administration, hereby approves . . . the charter of a person not a citizen of the United States of any vessel (including space in such vessel) documented under the laws of the United States. . . . Approval will not be granted to charters of the following nature:

(1) Demise or bareboat charters."

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46 C.F.R. Part 298 (1979)—Obligation Guarantees

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SUBPART A—INTRODUCTION

§ 298.1 Purpose.

This part prescribes regulations implementing the provisions of Title XI of the Merchant Marine Act, 1936, as amended by P.L. 92-507 (46 U.S.C. 1271-1279), governing Federal ship financing assistance.

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§ 298.3 Applications.

(a) *Content and Amendment.* Each application for a commitment to execute Guarantees shall be made on Form MA 163 to the Secretary, Maritime Administration, United States Department of Commerce, Washington, D.C. 20230, and be certified in the manner prescribed on said form. All required information, including copies of any demise charters, time charters in excess of six months, contracts of affreightment, drilling contracts or other contractual arrangements with respect to the Vessel or Vessels, shall be presented on the form or in exhibits and schedules submitted with the application. Each exhibit and schedule shall contain a statement, on the first page thereof, clearly identifying the document as an attachment to an application for Obligation Guarantees, stating the name of the applicant and the date of the application. Any amendment of data contained in the application filed shall be marked "Amendment", and shall contain a statement on the first page thereof, clearly identifying the document as an amendment to

an application for Obligation Guarantees, stating the name of the applicant and the date of application. The certification required on Form MA 163 shall be affixed to each amendment. The Secretary will not process the application until the applicant has submitted substantially all required information.

* * *

SUBPART B—ELIGIBILITY

§ 298.10 Citizenship.

(a) *Applicability.* Prior to acquiring a legal or beneficial interest in a Vessel financed under Title XI of the Act, the applicant and any other Person (including, but not limited to settlors, owner trustees, owner participants, bareboat charterers and such charterers other than bareboat charterers whose charter exceeds the blanket approval period provided for in Part 221 of this Title 46), shall establish its United States citizenship, within the meaning of section 2 of the Shipping Act, 1916 (1916 Act), as amended (46 U.S.C. 801-852), sections 37 and 38 of the Merchant Marine Act, 1920, as amended (46 U.S.C. 861-889), and, as applicable, section 905(c) of the Act, unless the Secretary approves a non-citizen participation under the authority of sections 9 and 41 and Section 37, as applicable, of the 1916 Act. The Secretary will not approve an application providing for ownership of such Vessel by, or bareboat chartering of such Vessel to, a non-U.S. citizen. See also Part 221 of this Title 46 concerning the documentation, transfer or charter of vessels to non-U.S. citizens. Citizenship may also be required of any Person who does not have a legal or beneficial ownership in the Vessel if such Person is the operator or has authority to direct the operation of the Vessel on behalf of the Shipowner.